No. 9892

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

LOIS ROGERS,

Appellee.

APPELLANT'S OPENING BRIEF

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Statement of Pleadings and Facts Disclosing Basis for Jurisdiction

(References are to pages in Transcript of Record)

Lois Rogers, appellee herein, instituted the above action July 5, 1940, in the Superior Court of the State of Arizona, in and for Maricopa County, for the purpose of recovering from New York Life Insurance Company, appellant herein, the sum of $4,000.00 on an insurance contract alleged to have been entered into between her husband, Zeno A. Rogers, and appellant. At the time

of bringing the action appellee (plaintiff below) was a resident of the State of Arizona, and appellant (defendant below) was a foreign corporation created under the laws of the State of New York and a non-resident of the State of Arizona. On the 20th day of July, 1940, appellant in accordance with the provisions of 28 U. S. C. A., Sec. 71, duly removed said action to the United States District Court for the District of Arizona. Under 28 U. S. C. A., Sec. 41, said District Court was given original jurisdiction over said action by reason of the fact that the matter in controversy exceeded, exclusive of interest and costs, the sum of $3,000.00, and the action was between citizens of different states. The pleadings necessary to show the existence of the jurisdiction of the District Court are the Complaint (2), the Petition for Removal (7), Notice of Filing Petition for Removal (13), Bond for Removal (15), Order for Removal (17) and Answer to Amended Complaint (22).

At the close of all the evidence introduced at the trial of the cause appellant moved the Court for a directed verdict in its favor. The Court denied this motion (34) and a verdict was returned for appellee. The District Court thereupon entered judgment in accordance with the verdict (37). The appellant made a timely motion to Set Aside the Verdict and Judgment and enter Judgment in accordance with Appellant's Motion for an Instructed Verdict and a Motion for a New Trial (39). The Court on June 28, 1941, denied these motions (41).

Notice of Appeal (42) was filed by appellant. Appellant thereafter filed a Stipulation Waiving Bond on Appeal (43), a Statement of Points upon which Appellant Intends to Rely (44), and Appellant's Designation

of Contents of Record on Appeal (46). The record on appeal was filed in this Court and the cause was docketed herein on the 11th day of August, 1941. By virtue of the foregoing proceedings taken within the time provided by 28 U. S. C. A., Sec. 230, and in accordance with the Rules of Civil Procedure of the District Courts of the United States, the above case is now before this court which under 28 U. S. C. A., Sec. 225, as amended, paragraph A, is given appellate jurisdiction to review final decisions of the District Courts.

STATEMENT OF THE CASE

Substance of the Amended Complaint (18)

1. Appellee alleged that on December 7, 1939, Zeno A. Rogers applied to appellant for a life insurance policy and that thereafter appellant issued and delivered to him a policy insuring his life in the sum of $2,000, with double indemnity features; that appellee was named beneficiary thereunder.

2. Alleged that said Zeno A. Rogers paid the initial premium on such policy and duly performed all the conditions thereof.

3. Alleged that Zeno A. Rogers died on January 28, 1940, as the result of an accident.

4. Alleged that though appellee demanded payment of the death benefits under said policy, appellant refused to pay said benefits.

Substance of Answer to Amended Complaint

The pertinent allegations in appellant's answer to the amended complaint (22) were as follows:

1. Appellant alleged that it did not issue the type of policy applied for by Zeno A. Rogers; that it issued a policy which differed from that applied for in that appellant indorsed thereon a rider clause modifying its liability in the event of the death of the insured while riding in or operating an aircraft.

2. Alleged that appellant mailed said policy to its Arizona Branch Office on December 19, 1939, with instructions that it not be delivered to Rogers until he paid the first premium and signed an agreement accepting the policy as modified by the aviation indorsement.

3. Alleged that through inadvertence and mistake and contrary to said instructions appellant's Arizona Branch Office forwarded the policy to Rogers without collecting the initial premium and without obtaining his signature to the agreement accepting the policy as modified; that appellant notified Rogers that the policy had been forwarded to him in error and requested him to return it.

4. Alleged that Rogers did not return the policy, did not pay appellant the first premium thereon and did not execute the agreement accepting the policy as modified.

Important Evidence

1. *Evidence pertaining to Rogers' employment by appellant and his application for a policy of insurance.*

On October 28, 1939, Rogers filed with appellant an application for a contract to write insurance as agent for appellant, and he thereupon commenced soliciting

insurance as one of appellant's agents in a regularly assigned territory (59). Though he was successful in obtaining many applications for policies, he earned no commissions from appellant, for he never remitted to appellant any of the premiums which he collected (154). At the time of his death he was indebted to appellant for premiums which he had collected but which he had failed to remit to appellant.

On December 7, 1939, Rogers applied to appellant for an insurance policy on the ordinary life plan, payable to appellee in the face amount of $2,000.00 upon receipt of due proof of the death of applicant and double the face of the policy upon due proof that death resulted from accident as defined under the provisions of the policy relating to double indemnity (P's Ex. 3-92).

2. *Evidence that appellant issued a policy differing from that applied for and that Rogers failed to accept the same.*

Under the type of policy Rogers applied for, the beneficiary was entitled to receive the face amount of the policy in the event the insured's death resulted from operating or riding in an unlicensed aircraft (92). Because Rogers' application disclosed that he had engaged in aeronautics, appellant issued a policy with a Permanent Aviation Clause which had the effect of lessening its burden if Rogers' death occurred while operating or riding in an unlicensed aircraft (90). Under this clause the beneficiary would receive only the reserve of the policy at the date of death instead of the face amount thereof.

When appellant forwarded the policy to its Arizona Branch Office it sent with the policy an agreement which

the applicant was to sign for the purpose of indicating his acceptance of the policy as modified (109). The applicant's signature was typed in on a copy of this agreement which was attached to and made a part of the policy. The Arizona Branch Office was instructed not to deliver the policy to applicant until the original agreement was signed, witnessed and returned to the office (D's Ex. C-1) (114).

3. *Evidence that the policy was forwarded to Rogers through inadvertence and mistake.*

Mr. Caskey, Cashier of appellant's Arizona Branch Office, testified that when an agent was handling a policy for someone other than himself, the policy was sent to him by the Arizona Branch Office and he was responsible for the collection of the first premium (123). He added that "when a policy comes out on the agent's own life, there is no one to represent him, he is representing himself with the result that we are supposed to hold the policy and tell him that upon the payment of the premium and his signature on any amendments to his original application." He further testified that this policy was forwarded to Rogers through error in office routine, resulting from the fact that the typist who billed the policies out to the agents in groups of 75 or 100 did not recognize the name of Rogers (124).

It was the practice of each of appellant's agents to submit to Caskey on the 15th day of each month, a report of the policies which had been forwarded to such agent (125). When Caskey received Rogers' report on January 20, 1940, he noted that Rogers' own policy was included in the report and he therefore wrote Rogers a letter on January 23, 1940, (129-D's Ex. E) in which he stated:

> "The policy issued on your life was forwarded to you in error, as until settlement of the first premium has been made in cash we are not permitted to forward a policy to an agent on his own life. Therefore, will you please see that the policy is returned to the office at once to be held until you can make settlement of the first premium."

The above letter and the policy were both found in Rogers' possession at the time of his death (215). There is no evidence that Rogers signed the agreement which appellant had asked him to sign in order to indicate his acceptance of the policy as modified by the aviation indorsement.

4. *Evidence that the payment of initial premium was a condition precedent to the insurance becoming effective and that such premium was not paid.*

The application which Rogers made for a policy provided (93-94):

> "It is mutually agreed as follows: (1) that the insurance hereby applied for shall not go into force unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime. * * *

The application also provided:

> "That if the applicant pays the agent in cash the full amount of the first premium * * * and so declares in the application and receives from the agent a receipt therefor on the receipt form which is attached hereto", and was at that time an insurable risk as shown by the medical examination,

"then said insurance shall take effect and be in force under and subject to the provisions of the policy for which application is made, whether the policy be delivered to and received by the applicant or not."

Mr. Caskey, in examining appellant's books of account which were introduced into evidence testified that no premium was ever paid on Rogers' policy (131). The application does not indicate that a premium was paid nor was there any evidence that Rogers had received a receipt for the payment of such premium.

5. *Evidence pertaining to waiver of requirement that the first premium be paid in cash.*

The only evidence in the record relative to a waiver of the provision in the policy that the insurance should not become effective until the first premium was paid in full was the testimony of appellee, the beneficiary under the policy. In relating a conversation which she had after Rogers' death with Mr. Lindberg, the director of appellant's Arizona Branch Office, she stated (185):

A. Well, when I said he (Lindberg) had no right to take that (the policy) and he said he did have a right because it was company property, I said, 'Well, isn't it true that you had an agreement of a credit arrangement between yourself and my husband to pay for this premium out of his accumulated earnings.' he said 'Yes, that is the way it was supposed to have been, but unfortunately he died before he was able to pay anything on it.' And I said, 'I still want the policy. I consider it my property'. He said 'Well, I can't give it to you.'"

This testimony was admitted over appellant's objection that Lindberg was without authority to bind appellant by extending credit for the payment of the first premium.

6. *Evidence that Rogers was notified by appellant that Lindberg had no authority to waive the requirement that the first premium be paid in cash.*

After stating that the insurance applied for should not go into force until the first premium was paid in full, the application provided (94-95):

> "(3) That only the President, a Vice-President, a Secretary or the Treasurer of the company can make, modify or discharge contracts or waive any of the company's rights or requirements."

There was no evidence that the requirement that the first premium be paid in full was waived by any of appellant's officers designated in the application as having authority to make such waiver.

In the Book of Instructions (Def's. Ex. F. 134) given to Rogers (210) at the time he was employed as an agent of appellant it was provided:

> "2. Unauthorized acts. An agent is not authorized: * * * (b) to make, modify or discharge contracts; (c) to extend the time for paying any premium; * * * (g) to collect or receive any monies for or on behalf of, or due or to become due to, the company except on applications obtained by or through him, and then only in exchange for the coupon receipts attached to the application corresponding in date and number with the application,

and in an amount not exceeding the first premium on the insurance applied for. 20. A policy must not be delivered — (a) if any change whatever has occurred in the health or occupation of the applicant, or if he has consulted or been treated by a physician since the date of his medical examination. In such case the agent must at once return the policy to his branch office with full particulars and await further instructions. The only exception to this rule is where the full amount of the first premium has been paid in cash at the time the application was made and the applicant has signed the declaration at the foot of the application to that effect and received the receipt provided, and the policy has been issued for the amount and on the plan applied for without advance in age or premium. (b) Until the applicant signs and delivers all the papers and performs every act required of him by the company. (c) Until the first premium thereon is in the hands of the agent.

"12. Notes. *The company will not accept a note in payment of the whole or any part of the first premium on a policy. The company will accept cash only in payment of a first premium. If an agent takes a note, he does so at his own risk and must be personally responsible for the same.* Agents are instructed not to issue a coupon receipt attached to an application in exchange for a note or for anything except cash." (Italics supplied)

Mr. Caskey and Mr. Lindberg both testified that the appellant never sold insurance on credit (159, 202). They stated that though an agent was permitted to accept from an applicant a note for the first premium, payable to the

agent personally, that was a private transaction between the agent and the applicant, and the agent was responsible for the remission of the premium in cash, regardless of whether or not the note was paid. The evidence disclosed that the appellant never took notes payable to itself or did any other type of credit business (159).

SPECIFICATIONS OF ERROR

I.

The Court erred in denying apellant's motion for an instructed verdict at the close of the entire case, for the following reasons:

1. The evidence disclosed that the application for the insurance policy on which this action was based was rejected by appellant's making a counter-offer which said counter-offer was not accepted by applicant.

2. The evidence disclosed that there was no legal delivery of the insurance policy involved in this action and that no initial premium was ever paid thereon, which said acts were by the terms of the policy conditions precedent to its taking effect.

II.

The Court erred in giving appellee's requested instruction Number 1, which is in totidem verbis as follows:

> "You are instructed, that if you believe from the evidence that prior to and up to and including the date of delivery of the life insurance policy sued on herein, the New York Life Insurance Company vol-

untarily and knowingly held Arthur F. Lindberg David F. Caskey out to the world as its Agency Director for the State of Arizona, and as authorized to supervise, direct and control the said company's life insurance business within said State of Arizona, and to permit, authorize or direct the delivery of life insurance policies similar to the one herein involved without the pre-payment of the first premium, or any premium thereon, and had so conducted itself in this regard, as to reasonably justify the public generally, and those dealing with it, in believing that the said Arthur F. Lindberg was authorized, permitted or directed to deliver, permit or cause to be delivered similar policies, and that the policy herein involved was received and accepted by the said Zeno A. Rogers, believing that the said Arthur F. Lindberg had authority to so deliver said policy without the pre-payment of premium, then the New York Life Insurance Company, in the absence of some reason or cause deemed sufficient in law, would be bound by the acts of the said Arthur F. Lindberg."

It was error to grant said instruction for the following reasons, which were urged by appellant at the trial (229):

1. As the evidence disclosed that Zeno A. Rogers had actual notice of the limitations which appellant placed upon the authority of its agent, Arthur Lindberg, it was improper to charge the jury that appellant was bound by Lindberg's acts if such acts were within the scope of authority he appeared to have to the public generally.

2. There was no evidence that Lindburg or Caskey was authorized to deliver the policy in question without first receiving payment of the initial premium.

III.

The Court erred in giving appellee's requested instruction No. 2, which is in totidem verbis, as follows:

> "You are instructed that either by contract or by operation of law, the said Arthur F. Lindberg, as Agency Director, the said Arthur F. Caskey, as Agency Cashier for the State of Arizona; and/or any other persons employed in said Agency office, charged with the duty of handling, controlling, mailing or delivery of insurance policies within the scope of their employment, are regarded as agents of the defendant company; and you are further instructed that such persons as agents could bind the defendant company within the limits of the authority with which they, or any of them, apparently were clothed, in respect to the subject matter of his agency, and for the protection of innocent third persons.
>
> "The authority of an agent is enlarged by implication when the principal permits the agent to do acts not expressly authorized, and if, through inattention or otherwise, the defendant company suffered its agents, or any of them, to act beyond his, or their, authority without objection, then the company, in the absence of some reason or cause deemed sufficient in law, is bound to those who were not aware of any want of authority, to the same extent

as if the requisite power had been directly conferred."

It was error to give said instruction for the following reasons which were urged by appellant at the trial (229):

1. As the evidence showed that Rogers had actual notice of the limitations on the authority of appellant's agents with whom he dealt, the jury should not have been permitted to consider any question of apparent authority.

2. Said instruction is hopelessly vague in that it fails to define the phrase "some reason or cause deemed sufficient in law."

IV.

The Court erred in giving appellee's requested instruction No. 3, which is in totidem verbis, as follows:

"You are instructed, that if you find from the evidence that the policy sued on herein was mailed to, and received by the said Zeno A. Rogers previous to the time of his death, or that said policy was found among the papers of the said Zeno A. Rogers after his death, and that said policy acknowledged the payment of the first premium, then such delivery, possession and acknowledgment constitute prima facie evidence of a binding contract of insurance, and the burden of proof falls upon the defendant company to establish, by evidence, some reason regarded by the law as good and sufficient, why the plaintiff should not recover judgment in this action."

It was error to give said instruction for the following reasons which were urged by appellant at the trial (230):

1. Though Rogers' possession of the policy gave rise to a presumption of delivery and placed on appellant the burden of going forward with the evidence, this presumption was dissipated by evidence explaining such possession, and plaintiff had the burden of proving that the policy was legally delivered.

2. The Court, in effect, charged the jury that such a presumption could be considered as evidence.

3. It was incorrect to charge the jury that "the burden of proof falls upon the defendant to establish some reason regarded by law as good and sufficient why plaintiff should not recover judgment."

V.

The Court erred in giving appellee's requested instruction Number 4 which is in totidem verbis as follows:

> "You are instructed, that the application for life insurance policy signed by Zeno A. Rogers and said life insurance policy issued in connection therewith are to be construed together, and if you find from the evidence that the said Zeno A. Rogers, in his executed application, waived all benefits of his insurance policy in case of an accident in connection with aircraft, then you are instructed that the signature of Zeno A. Rogers to the so-called permanent aviation clause proposed for his further

signature, was not essential to constitute an enforcible life insurance contract; and if you find all other necessary facts in favor of the plaintiff, you are instructed that the plaintiff is entitled to recover in this action, notwithstanding any such failure, if such you find, on the part of Zeno A. Rogers to sign said permanent aviation clause previously to the delivery to him of said insurance policy."

It was error to give said instruction for the following reason which was urged by appellant at the trial (230):

1. It was an incorrect statement of the law to charge the jury that a contract could be consummated even though Rogers did not accept appellant's offer in the manner required by appellant.

VI.

The Court erred in rendering judgment for appellee for the reason and upon the grounds as follows:

1. The verdict is contrary to and not justified by the evidence for the reasons specified in Specification No. I.

2. The judgment is contrary to law for the reasons specified in Specification No. I.

VII.

The Court erred in denying appellant's Motion to Set Aside the Judgment and to Enter Judgment in Accordance with Defendant's Motion for an Instructed Verdict

for the reasons and upon the grounds specified in Specifications Nos. I, II, III, IV, V, and VI.

VIII.

The Court erred in denying appellant's Motion for a New Trial for the reasons and upon the grounds specified in Specifications Nos. I, II, III, IV, V, and VI.

SUMMARY

For the purpose of simplifying the argument the above errors may be divided into six fundamental propositions which become the main issues in the case. These issues will be developed in the following manner:

ISSUE I.

Rogers' Failure to Accept Appellant's Offer of Policy in Manner Indicated by Appellant Prevented Consummation of Contract of Insurance. (***Errors I, VI, VII and VIII***)

(a) Issuance by appellant of policy differing from that applied for constituted counter-offer and rejection of Rogers' application.

(b) Acceptance of counter-offer must be made in manner indicated therein.

(c) No contract is created where counter-offer not accepted.

ISSUE II

Legal Delivery of Policy to Rogers Was Essential to Consummation of Insurance Contract. (***Errors I, VI, VII, and VIII***)

(a) Delivery of the policy was by terms thereof condition precedent to contract.

(b) Appellant's forwarding policy to Rogers through inadvertence and mistake did not constitute legal delivery of policy.

(c) If policy were delivered to Rogers it was delivered to him in his capacity as appellant's agent and not in his individual capacity.

(d) There can be no constructive delivery of a policy when further acts are required of applicant.

ISSUE III.

Rogers' Failure to Pay Initial Premium Prevented Insurance from Going into Effect. (***Errors I, VI, VII, and VIII***)

(a) Rogers was notified that Lindberg was unauthorized to extend credit for payment of initial premium.

(b) Appellant was not bound by Lindberg's attempted waiver of requirement that such premium be paid in full.

ISSUE IV.

Scope of Lindberg's Apparent Authority Was Not Proper Subject for Jury's Consideration When Evidence Disclosed Rogers' Knowledge of Limitations on Lindberg's Actual Authority. (***Errors II and III***)

ISSUE V.

Rogers' Possession of Policy Which Evidence Showed Was Forwarded to Him by Mistake Did

Not Place on Appellant Burden of Proving Why Beneficiary Should Not Recover Judgment. (*Error IV*)

ISSUE VI.

Appellant Had Right to Designate Manner in Which Its Counter-offer Should Be Accepted by Rogers. (*Error V*)

ARGUMENT

Issue I.

Rogers' Failure to Accept Appellant's Offer of Policy in Manner Indicated by Appellant Prevented Consummation of Contract of Insurance..

(a) *Issuance by appellant of policy differing from that applied for constituted counter-offer and rejection of Rogers' application.*

The courts have consistently applied to insurance contracts the fundamental rule of contract law that an acceptance of an offer is of no legal effect unless it is made unconditionally. It is stated in 14 R. C. L., at page 895:

> "To be effective the acceptance of an application must be in the very terms offered. Where it is on different terms the contract is not complete until the applicant has signified his acceptance to the new terms."

In the case of *Morford vs. California Western States Life Insurance Company*, (Ore. 1941) 113 Pac. (2d) 629, the policy issued by the defendant company differed from the policy which had been applied for in that the

policy contained no waiver of premium in case of total disability. The court, in rejecting plaintiff's contention that the policy became effective when it was mailed by the company to its agent, stated, at page 633:

> "Until the applicant had notice or knowledge as to the character of the change the company proposed to make and had agreed in writing thereto, the contract of insurance was not complete. In other words, the policy issued was a counter offer, which required acceptance by the applicant in order to be effective as a contract. Cranston vs. California Insurance Company, 94 Or. 369, 185 Pac. 292."

The Court later states at page 635:

> "And as a general rule, if the insurer replies to the application by proposing different terms, or by sending a policy differing in essential terms from that applied for, no contract is made until the counter proposition or policy has been accepted by the applicant, even though the insurer retains the premium pending action by the insured. In such a case there is no contract, as the minds of the parties never met upon the terms. (Citations)."

The fact that there is only a slight variance between the policy which is issued and the policy which was applied for will not prevent the application of the rule that an offer must be accepted unconditionally.

In the case of *Blackwell vs. Roseberry*, (La. 1934) 154 So. 641, the applicant applied for a policy with an annual premium. The company, however, issued a policy with a semi-annual premium. In holding that there was no con-

tract of insurance until the policy was accepted by the applicant the court stated:

> "The general rule is that, when a policy varies in any way from the terms proposed in the preliminary negotiations, it becomes in its turn a mere counter proposition 'and to constitute a binding contract must be accepted by the applicant.' Cooley's Briefs on Insurance, Second Edition, Vol. 1, page 673; Mutual Life Insurance Co. vs. Young, 23 L. Ed. 152; Cooley's Briefs on Insurance, Second Edition, Vol. 1, page 674."

In the case before the court Rogers applied for a policy which would pay his beneficiary the face amount of the policy in the event Rogers' death occurred while riding in or operating an unlicensed aircraft. Appellant, however, issued a policy which would pay the beneficiary only the reserve amount of the policy in the event Rogers' death occurred under such circumstances.

How can it be argued that this was an unconditional acceptance of the application? This plainly was a rejection of the application. In legal effect appellant's issuance of a policy incorporating different terms constituted a counter offer.

(b) *Acceptance of counter-offer must be made in manner indicated therein.*

Appellant instructed its Arizona Branch Office not to deliver the policy to Rogers until he had signed an agreement indicating that he accepted the policy as modified by the aviation endorsement (114). As the policy contained terms to which Rogers had not assented, he had

the right to reject it. The fact that Rogers accepted the policy from the mails would not establish in appellant's records whether or not he had decided to accept or reject it. No one will quarrel with the wisdom of appellant's adding to its counter offer a condition that acceptance should be indicated by executing and returning to appellant the enclosed agreement. This Rogers failed to do.

(c) *No contract is created where counter-offer not accepted.*

In the case of *McDonald v. Mutual Life Insurance Company of New York,* (C.C.A. 6th, 1939) 108 Fed. (2d) 32, the applicant named his children as the beneficiaries in the policy to be issued but failed to insert in the application a provision covering the payment of the proceeds in the event his children predeceased him. The defendant company attached to the policy it issued a rider providing for the payment of monthly instalments of $50 each to the children during their lives and on their death the payment of a lump sum to the executor of the last survivor. The policy was mailed to the applicant with instructions that he sign and return an enclosed statement indicating his approval of the endorsement pertaining to Mode of Settlement. Though the applicant made provision for payment of the premium and obtained possession of the policy, the court held that the consummation of an insurance contract was prevented by applicant's failure to sign the agreement accepting the policy as modified. The court stated:

> "As the application was for a policy principally for the benefit of the children, the 'mode of settlement' was of major importance. It was an offer of

> a new contract, and could be accepted only by an unequivocal indication that the applicant had been aware of and was satisfied with the changes made in the instrument. This was to be shown by the applicant's signature to the form of acceptance of the mode of settlement and to the inspection receipt, and their return to the company. While the inspection receipt contained certain provisions with reference to payment of premium, plainly inserted because of the fact that the proposed policy, as was customary, acknowledged receipt of the first premium, it was not ambiguous, and its principal condition is that the policy is received for inspection only. These conditions were communicated to the applicant not only by being enclosed with the letter, but by the instruction of the agent, 'if you will approve of the rider, will you please sign the two enclosed forms and return to me.' The mailing of the check for the premium was not compliance with these conditions, nor did it constitute acceptance of the offer. At the time of the applicant's death, the policy, therefore, was not in effect."

In a life insurance contract, as in the case of all contracts, it is essential that there be a meeting of minds of the contracting parties. Rogers had but one method of indicating that he would enter into a contract and that was to execute and return to appellant the agreement accepting the policy as modified. As he failed to do this the minds of the parties never met on the terms of the contract. Several very pertinent decisions holding that there is no meeting of minds and consequently no contract when the applicant fails to accept or reject a policy differing from that which was applied for are: *Long vs.*

New York Life Ins. Co., 106 Wash. 458, 180 Pac. 479; *Drake v. Missouri State Life Ins. Co.*, (C. C. A. 8th 1927), 21 Fed. (2d) 39.

ISSUE II

Legal Delivery of Policy to Rogers Was Essential to Consummation of Insurance Contract.

(a) *Delivery of the policy was by terms thereof condition precedent to contract.*

It was provided in the application which was annexed to the policy (93):

> "It is mutually agreed as follows: 1. That the insurance hereby applied for shall not go into force unless and until the policy is delivered to and received by the applicant * * during his life time."

There is no question but that Rogers and appellant had the right to agree that the insurance applied for should not become effective until the happening of a certain event, to-wit, the delivery of the policy to Rogers. As stated in Vol. 29, Amer. Jur. at page 164: "Unless it is waived, delivery is also essential where the parties agree and the application or policy provides that the contract of insurance shall not be complete until delivery of the policy. Accordingly, where an applicant for life insurance agreed that the policy should not take effect until issued and delivered, the approval of the application and execution of the policy by the insurer creates no liability, in default of its actual delivery."

In the case of *Curtis vs. Prudential Ins. Co.*, (C. C. A. 4th, 1932) 55 Fed. (2d) 97, the applicant died after the

policy was issued by defendant company but before the policy was delivered to him and before he had paid the initial premium thereon. In referring to that portion of the application which provided that the insurance should not go into force until the policy was delivered and the first premium paid, the court said:

> "The validity of the provisions in the application and the policy is unquestioned. Similar provisions have been passed upon by the courts, and, so far as we can find, have been uniformly approved. * * * While we recognize the force of the contention made on behalf of the plaintiff that forfeitures are not favored at law, yet where there have been no contracts there can be no forfeiture of a contract, and we think this is a case of no contract. None of the conditions precedent especially stipulated as necessary before the contract became binding was ever properly waived by anyone having authority. Slocum vs. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879; New York Life Ins. Co. v. Fletcher, 117 U. S. 519; 6 S. Ct. 837, 29 L. Ed. 934; Hoffman vs. John Hancock Mutual Life Ins. Co., 92 U. S. 161, 23 L. Ed. 539; Philadelphia Life Ins. Co. v. Hayworth (C. C. A.) 296 F. 339; Aetna Life Ins. Co. v. Johnson (C. C. A.) 13 F. (2d) 824; Dodd v. Aetna Life Ins. Co. (C. C. A.) 35 Fed. (2d) 673; Bradley v. New York Life Ins. Co. (C. C. A.) 275 F. 657."

To the same effect as the above decisions are: *Hruska vs. Prudential Ins. Co.*, 203 Ia. 1165, 211 N. W. 858, 32 *Corpus Juris*, 1123, *Cooley's Briefs on Insurance*, 2nd Ed., Vol. 1, p. 630.

(b) *Appellant's forwarding policy to Rogers through inadvertence and mistake did not constitute legal delivery of policy.*

The law relative to what constitutes a delivery is set forth in 29 Am. Jur. at page 164:

> "In the absence of an express provision therefor, the question is not dependent upon, nor does the law require manual delivery to the insured in person if the legal essentials of delivery are present. These essentials, generally speaking, are (1) an intention to part with control of the instrument and to place it in the possession or control of the insured or some person acting for him, and (2) an act evincing such purpose."

A similar test is found in 32 C. J. at page 1126:

> "The test of a sufficient delivery is whether the company or its agents intentionally parts with control or dominion of the policy and places it in the control or dominion of the insured or some person acting for him with the purpose of thereby making a valid and binding contract of insurance. The controlling question is not who has the actual possession of the policy, but who has the right of possession."

Applying the foregoing principles to the instant case, there is no question but that appellant was entitled to possession of the policy even though Rogers at the time of his death had it in his possession. No one would argue that there was a legal delivery of a policy which had been stolen from the appellant's files or had been lost

on the street. In each instance there is lacking the requisite intent to relinquish possession of the policy for the purpose of making it a binding contract. As soon as appellant discovered its mistake in mailing the policy it wrote Rogers asking him to return it to the Arizona office. Had Rogers lived and refused to send it back, appellant could have maintained appropriate legal action to regain possession of it. Rogers was in no way misled or prejudiced by appellant's mistake. There was not a scrap of proof adduced at the trial which would sustain a finding that the policy was ever legally delivered to Rogers.

(c) *If policy were delivered to Rogers it was delivered to him in his capacity as appellant's agent and not in his individual capacity.*

There is a striking similarity between the facts in the instant case and the facts in the case of *Urseth vs. Sun Life Assurance Company of Canada,* (C. C. A. 8th, 1941) 119 Fed. (2d) 529. In the Urseth case the applicant for the insurance policy in question was, like Rogers, a soliciting agent of the defendant insurance company. Pursuant to his application, the defendant company forwarded a policy to him with a memorandum of instructions not to deliver the policy until the premium was paid. The application which Urseth signed provided that the policy should not take effect until the first premium was paid during applicant's life time. Though the defendant company wrote Urseth about the policy, he did not pay the premium prior to his death. To avoid the non-payment of premium the plaintiff argued that the court should adopt the settled rule of law in Missouri to the effect that when a policy is delivered to the applicant there is as a matter of law an automatic exten-

sion of credit and a waiver of the requirement that the initial premium be paid. The court refused to apply this rule of law, holding that since the policy was delivered to Urseth in his capacity as an insurance agent he had no right to deliver it to himself as an individual until all the conditions precedent were complied with. The court stated:

> "In the present case, the policy came into Urseth's hands as an agent of the company, and not as one of its insureds. Plaintiff argued that, where the agent is the applicant for the insurance, a delivery to the agent ought to be held to be a delivery to the insured. But such an indistinguishability does not follow, where, as here, an obligation was imposed upon him as agent, in connection with the receipt of the policy, which the company had a right to require of him, and which was his duty under his agent's contract to perform. Under the memorandum of instructions placed with the policy when it came into his hands, Urseth, as agent, could not legally release the policy to himself, so as to enable it to become effective, until the initial premium was paid. Whatever might be the necessity and justice of creating an estoppel against the company, where an agent has placed a policy in the hands of a third party insured, in violation of his instructions, the wrongful acts of an agent certainly do not compel an estoppel against the company in favor of himself. The law will not permit an agent to profit from his own fraud as against his principal."

The policy in the instant case was forwarded to Rogers along with other policies which were sent to him as ap-

pellant's agent. Though under the above ruling this might have been a delivery to him as an agent, it was not a delivery to him as an applicant for there was a further condition to be complied with, to-wit, the payment of the premium and the signing of the agreement, before appellant's agents were to relinquish control of the policy. Rogers should not be permitted to profit from his own fraud as against his principal.

(d) *There can be no constructive delivery of a policy when further acts are required of applicant.*

Can it be argued that a legal delivery of the policy was unnecessary? It is a well recognized rule of law that where an application for a policy of insurance has been accepted and a policy issued, then if nothing further remains to be done by the applicant, any disposition of the policy made by the company which evidences an intention to put the policy out of its control and in control of the applicant is sufficient to constitute a delivery (53 A. L. R. 492). Where, however, a policy is not issued as applied for but is mailed to the agent for delivery to the applicant only upon the performance of certain conditions, then, in such case, there can be no constructive delivery. Under these circumstances, an actual physical delivery of the policy is necessary to the existence of a binding contract (123 A. L. R. 907). The United States Circuit Court of Appeals for the Ninth Circuit stated in the case of *Jackson vs. New York Life Ins. Co.,* (C. C. A. 9th) 7 Fed. (2d) 31:

> "A policy of insurance is 'delivered' to insured when it is deposited in the mails duly directed to insured at his proper address, even though he never receives it, and it is constructively delivered when it

> is mailed to an agent unconditionally for delivery to insured, even though the agent does not actually deliver it, *but the rule is otherwise when the policy is mailed to the agent for delivery only on performance of certain conditions.*" (Underscoring supplied)

Cooley states in his briefs on Insurance, 2nd Ed., Vol. 1, pp. 631:

> "So, too, if the policy as written does not conform to the application, it cannot become a binding contract until it has been delivered to and accepted by the insured."

Two pertinent decisions which support the conclusion that there can be no constructive delivery in the instant case are: *Kinney v. Northern Life Ins. Co.,* 200 Wash 190, 93 Pac. (2d) 360; and *Long v. New York Life Ins. Co.,* 106 Wash. 458, 180 Pac. 479.

ISSUE III

Rogers' Failure to Pay Initial Premium Prevented Insurance from Going into Effect.

(a) *Rogers was notified that Lindberg was unauthorized to extend credit for payment of initial premium.*

The only testimony in the records relative to the payment of the initial premium was appellee's statement that Mr. Lindberg told her that he had entered into a credit arrangement with Rogers to pay the premiums out of future earnings (185). As the application and the policy provided that the insurance should not go into force until the first premium was paid in full, it was vital to the existence of appellee's case that she prove

that appellant authorized Lindberg to waive this requirement that the initial premium be paid. This she completely failed to do.

The evidence disclosed that it was the appellant's practice to accept nothing but cash in payment of premiums (204, 209, 210). The Book of Instructions which was given to Rogers stated that this was the company's rule (134). Furthermore, the application which Rogers signed not only provided that the insurance should not go into effect until the first premium was paid in full, but also advised Rogers that only certain designated officers of appellant could waive or modify the terms of the application (94-95). Lindberg, not being one of these officers, had no authority to waive the requirement that the initial premium be paid in cash. He so testified at the trial. (202)

It is horn book law that a principal is not bound by the acts of his agent where such acts are not within the scope of the agent's authority. It never has been and it cannot be the law that a principal is bound by the acts of an agent which are not only unauthorized but are directly contrary to the authority conferred. The only exception to this rule is that created by the law of estoppel. Where, however, the third person dealing with the agent has notice of the limitations placed on the agent's authority, there can be no question of estoppel involved.

The courts are in accord in holding that an applicant is put on notice of the limitations on the agent's authority which were set forth in the application. In the case of *New York Life Ins. Co. vs. Horton* (C. C. A. 5th, 1925) 9 Fed. (2d) 320, the agent delivered a policy to

the applicant's husband, knowing that the applicant had become ill subsequent to the filing of her application. The court, after quoting the provisions of the application limiting the powers of the agent and also portions of the Book of Instruction which were given to all agents of New York Life Insurance Company, said:

> "The plaintiff when acting for his wife in dealing with Hines (the agent) in reference to the insurance applied for, was chargeable with notice of the restrictions or limitations on the latter's authority to deliver the instrument sent to him, with the result that, if Hines parted with the instrument when he was not authorized to do so, his act was no more effective against the defendant than it would have been if the plaintiff had actually known of the agent's lack of authority."

The case of *New York Life Ins. Co. v. Fletcher,* 117 U. S., 519, 29 L. Ed. 934, is authority for the proposition of law that an applicant is presumed to have read his application and to have known the contents thereof. Such a rule can be applied with even greater effectiveness to the facts of the instant case, for here the applicant was engaged in the business of selling life insurance policies for the appellant and presumably was well acquainted with its regulations. Certainly Rogers' position does not have the same appeal to our sympathies as that of the typical layman. In fact, it is difficult to find any equities in his favor, for, in addition to the application, the Book of Instructions advised him that: "The Company will accept cash only in payment of a first premium." (137) There was no evidence that appellant was guilty of any conduct which would lead Rogers to believe that the application and Book of Instructions did not mean what

they said. Nor was there any evidence that appellant held out Lindberg as having authority to alter terms of the applications or waive the established rule that the first premium be paid in cash.

(b) *Appellant was not bound by Lindberg's attempted waiver of requirement that such premium be paid in full.*

The application itself expressly limited Lindberg's authority for it stated that only certain designated officers could waive or modify its terms. The United States Supreme Court has held that where an agent's authority to waive conditions is expressly limited by the policy, such limitations govern. *Northern Assurance Co. v. Grand View Bldg. Ass'n.,* 183 U. S. 308, 46 L. Ed., 213, *N. Y. Life Ins. Co. v. Fletcher,* supra.

In a host of decisions involving an attempted waiver of the first premium the courts have given the nonwaiver clause its intended legal effect. In *Aetna Life Ins. Co. v. Johnson,* (C. C. A. 8th, 1926) 13 F. (2d) 824, the court, in holding that an agent was not authorized to deliver a policy on insured's oral promise to pay the premium within a few days, stated:

> "It is a rule generally adopted in the United States courts that, if a policy of life insurance provides that it is not to take effect until the first premium is paid, recovery cannot be had upon the policy, when it appears that the premium was unpaid at the date of the death of the insured, unless it appears that payment was waived by action of the insuring company.

"A waiver of this requirement cannot be made by an agent of the insurance company, when the policy provides that no person except other designated officers of the insurance company may alter or waive any provision of the policy, unless the insuring company has authorized the waiver to be made."

In *MacKelvie v. Mutual Ben. L. Ins. Co.* (C.C.A. 2nd, 1923) 287 Fed. 660, where the agent delivered a policy contrary to instructions and gave the insured a receipt before the premium was paid, the court decided that there was no waiver:

"The law is settled in this court that, when a life insurance policy contains, as this one did, the provision that it 'will not take effect, unless the first premium or agreed installment thereof shall be actually paid during the lifetime of the insured,' the provision means exactly what it says and will be enforced. And if the policy contains, as this one did, the express provision that 'agents are not authorized to make, alter or discharge contracts', the waiver relied on must be one by the company itself, and no attempted waiver by an agent will be treated as its equivalent. In Pennsylvania Casualty Co. v. Bacon, 133 Fed. 907, 67 C. C. A. 497, a policy of insurance stated that it was not to take effect 'unless the premium is actually paid previous to any accident upon which claim is made,' and it provided that no waiver should be binding on the insurer unless indorsed on the policy and signed by the president or secretary of the company. This court held that a subagent had no authority to accept

a note in lieu of cash for the first premium, and to thereby waive the provisions of the policy. The decisions of the Supreme Court in Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; Penman v. St. Paul Fire and Marine Ins. Co., 216 U. S. 311, 30 Sup. Ct. 312, 54 L. Ed. 493; Aetna Life Insurance Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; Lumber Underwriters v. Rife, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. Ed. 1140; Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. Ed. 1202 — support the same doctrine. The provisions that a policy of life insurance shall not take effect unless the first premium is actually paid in cash during the lifetime of the person insured is valid and will be enforced according to its terms."

The Supreme Court of Georgia held in *Penn. Mut. Life Ins. Co. v. Blount*, 33 Ga. App. 642, 127 S. E. 892:

"The agreement signed by the assured in his application, 'that neither agents nor examiners have any authority to modify or enlarge contracts,' and the clauses in the policy that 'no alteration of this policy or waiver of any of its conditions shall be valid unless indorsed thereon and signed by an officer of the company,' and that 'no agent is authorized to modify, alter, or enlarge this contract,' placed the assured upon notice that the agents of the company were without any authority to put the policy in force unless the first premium thereon was actually paid during his lifetime and good health. The limitations as thus expressed applied to all agents, including general agents. A principal may qualify

> the authority even of a general agent, and will not be bound by acts of such agent beyond the scope of this authority, where the person dealing with him has notice of the limitations thereon."

The applicant in the case of *Bradley v. New York Life Ins. Co.* (C. C. A. 8th, 1921) 275 Fed. 657, attempted to pay the initial premium by giving his note to the agent under an agreement that the agent would personally pay the premium and look to the note. The application, as in the instant case, provided that the payment of the first premium was a condition precedent to the insurance taking effect, and further, that only certain designated officers of the company could modify the terms of the application. The policy was issued as applied for and forwarded to the local agent, but as he was informed of the applicant's death before delivering it, he returned it to the company. The court, in holding that there was no liability, stated:

> "The transaction between Bradley and Reaser, the agent, whereby a note was given for the premium must be held to have been a private arrangement between Reaser and Bradley concerning which the company had no knowledge and which was in direct violation of the rules of the company and the instructions given to the agent. So far as the company is concerned, the record shows no arrangement whereby anything but cash should constitute a valid payment of the first premium. It must be conceded that there was no manual delivery of the policy to Bradley in his lifetime or good health, or at all."

The application which the court considered in the case of *New York Life Ins. Co. v. McCreary* (C. C. A.

8th, 1932), 60 Fed. (2d) 355, was identical with the one in the instant case. It provided that in order for the insurance to become immediately effective the applicant would have to pay the first premium in cash, receive from the agent a receipt form, and sign a declaration stating that she had paid the premium to the agent. Though the applicant did pay the premium to the agent, she did not comply with the other conditions of the application. It will be remembered that Rogers also did not comply with the conditions relative to receiving a premium receipt or declaring in the application that he had paid the premium. The Circuit Court of Appeals for the 8th Circuit held that the insurance was not in force, stating:

> "She was therefore charged with notice and knowledge thereof, and they were in the nature of conditions precedent, the fulfillment of which were required by the insurance company before it either became or agreed to become an immediate insurer on the life of the applicant. Jensen v. New York Life Insurance Company (C. C. A. 8) 59 F. (2d) 957; Inter-Southern Life Ins. Co. v. McElroy (C. C. A. 8) 38 F. (2d) 557, 559; Person v. Aetna Life Ins. Co. (C. C. A. 8) 32 F. (2d) 459, 460; New York Life Ins. Co. v. Horton (C. C. A. 5) 9 F. (2d) 320; St. Louis Architectural Iron Co. v. New Amsterdam Casualty Co. (C. C. A. 8) 40 F. (2d) 344; Clements v. Preferred Acc. Ins. Co. (C. C. A. 8) 41 F. (2d) 470, 76 A. L. R. 17; Niagara Fire Ins. Co. v. Pospisil (C. C. A. 8) 52 F. (2d) 709; Aetna Life Ins. Co. v. Johnson (C. C. A. 8) 13 F. (2d) 824; MacKelvie v. Mutual Life Ins. Co. (C. C. A. 2) 287 F. 660.

At page 358, the Court states:

"It is contended that these conditions were waived because of the acts and knowledge of the defendant's soliciting agent. It is, however, to be observed that the application signed by the applicant contained specific provisions that only the president, a vice president, a second vice president, a secretary or the treasurer of the company could waive any of the company's rights or requirements. The principles of the general law of agency are applicable to insurance companies and their agents (Globe Mutual Life Ins. Co. vs. Wolff, 95 U. S. 326, 24 L. Ed. 387). And insurance companies, unless inhibited by valid statutory provisions, may limit the authority of their agent by agreement contained in the application for insurance, and such agreements are binding upon the applicant. Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. Ed. 356; Northern Assurance Co. v. Grand View Bldg. Ass'n., 183 U. S. 308, 22 S. Ct. 133, 46 L. Ed. 213; Jensen v. New York Life Ins. Co. (C. C. A.) 59 F. (2d) 957; Inter-Southern Life Ins. Co. v. McElroy (C. C. A.) 38 F. (2d) 557; Curtis v. Prudential Life Ins. Co. (C. C. A.) 55 F. (2d) 97 * * *

"The applicant, of course, is charged with notice of the agent's want of authority, and hence no resort can be had to the doctrine of apparent, ostensible, or implied authority. New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 S. Ct. 837, 843, 29 L. Ed. 934; Jensen v. New York Life Ins. Co. (C. C. A.) 59 F. (2d) 957; Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 527, 57 L. Ed. 879, Ann. Cas. 1914D, 1029."

Other pertinent decisions involving similar facts and similar rulings are: *Etenburn vs. Metropolitan Life Ins. Co.,* 118 Okla. 55, 246 Pac. 383, *Braman v. Mutual Life Ins. Co. of N. Y.* (C. C. A. 8th, 1934) 73 Fed. (2d) 391.

In view of the foregoing decisions it is immaterial that Lindberg, instead of being a soliciting agent, was the Director of appellant's Arizona Agency. If we are going to give any legal effect to a clause providing that only certain officers can waive conditions of the application, the rank of the agent attempting to make such waiver can have no bearing on the question if, in fact, he was forbidden to waive. In short, there is nothing present in the fact situation before the court which would justify forsaking the well established principles of agency and contract law.

In spite of the persuasive decisions which have been discussed herein it should be pointed out that there are cases which give rather plausible support to the argument that an agent is not bound by the limitations which have been placed upon his authority. Broadly speaking, the courts do not agree on the effect of a provision in an application limiting the power of an insurance agent to waive the conditions therein. Some of this lack of harmony in the decisions may be explained by the fact that each policy has a differently worded non-waiver provision. The real cause, however, is that a wide variety of fact situations arise under these provisions. They involve waiver and estoppel in various forms — such as the general course of business between the insured and the agent, or knowledge of the agent before issuing the policy that there was other and undisclosed insurance or that there was some condition which would

render the policy void by its terms. As an example, the agent may, after a claim arises, absolutely deny liability, and the insured because of such denial, may fail to file the necessary proofs of loss. These various situations, however, all contain the elements of estoppel. (It is well to keep in mind that the doctrine of waiver differs little from estoppel, and the terms are used interchangeably in this field of the law.) It is not surprising, therefore, that the courts, in some instances, hold the non-waiver provision to be ineffective. It is to be expected that when an agent accepts premiums knowing of the breach of some condition which renders the policy void, the court will not sympathize with a company which has continued to collect premiums on a policy which it now contends was void ab initio. As a result courts fall back on the rule that knowledge of the agent is knowledge of the company; and that in spite of the non-waiver clause the company, by its conduct, has estopped itself from contending that there could be no waiver.

It is common practice for text writers and courts to quote the general language of another court and completely ignore the facts on which such language is based. The result is that there has emerged from these diversified fact situations many broad statements of law to the effect that a non-waiver clause may itself be waived. In almost every instance the cited decisions merely propound the rule that a non-waiver clause will not prevent the ordinary laws of estoppel from taking effect.

The danger of indulging in such generalities is obvious when one considers how the equities vary in each case. It is difficult, however, in the instant case to dis-

cover the existence of any equities in favor of Rogers. It is true that a mistake was committed in appellant's office routine, but this gives rise to no equities in his favor for he was advised of the mistake before his death. As he was engaged in the insurance profession, he was well aware of the limitations appellant placed on the authority of its agents. There is no reason whatever for applying the doctrine of estoppel, and therefore the court would not be warranted in placing appellant, who necessarily must act through agents, in the anomalous position of not being able to restrict the authority of such agents.

ISSUE IV

Scope of Lindberg's Apparent Authority Was not Proper Subject for Jury's Consideration When Evidence Disclosed Rogers' Knowledge of Limitations on Lindberg's Actual Authority.

Plaintiff's instruction Number One charges the jury that appellant is bound by Lindberg's act in waiving the payment of the first premium if appellant knowingly held Lindberg out to the world as having such authority and if Rogers believed Lindberg had such authority. Plaintiff's instruction Number Two correctly states the abstract principles of the law of estoppel and apparent authority but, like plaintiff's instruction Number One, it assumes that there was evidence that appellant had held Lindberg out to the public generally as having authority to waive conditions in the application and that Rogers was thereby misled. There was no such evidence introduced at the trial; in fact, all the evidence was directly contrary to the facts assumed in these instructions. Since it was proved that Rogers had actual notice

of the limitations on Lindberg's authority, it was highly prejudicial to permit the jury to consider any question of apparent authority.

In the case of *Wells vs. Prudential Ins. Co.*, 239 Mich. 92, 214 N. W. 308, it was the contention of the defendant company that the policy was delivered to applicant merely for inspection and that no premium had been paid. In reply to the plaintiff's attempt to prove that the agent had agreed to extend credit for the payment of the first premium, the court referred to the limitations on the agent's authority which were contained in the instructions, stating:

> "An insurance company may limit the authority of its agent. If it holds him out or gives him apparent authority beyond such limit, it is nevertheless bound by his acts within such apparent authority. But no such question is before us. The agent was not upon his record clothed by his principal with an apparent authority to change and modify the terms of the policy. The policy affirmatively established the contrary. In Mr. Wells' written application it was agreed that the contract of insurance should not be enforced until the first premium was paid, and there is no claim that his signature was fraudulently procured. What is claimed is that there was a contemporaneous parol agreement varying its terms. * * * That insurance companies for their own protection may make such stipulations in their contracts as are here found, that such stipulations are enforceable and may be invoked, has been the settled law of this state for many years. Continental Life Ins. Co. v. Willets, 24 Mich. 268; McIntyre v.

Mich. State Ins. Co., 52 Mich. 188, 17 N. W. 781; Robinson v. Insurance Co., 76 Mich. 641, 43 N. W. 647, 6 L. R. A. 95; Hale v. Farmers' Mut. Fire Ins. Co. 148 Mich. 453, 111 N. W. 1068; Bowen v. Prudential Insurance Co., 178 Mich. 63, 144 N. W. 543, 51 L. R. A. (N. S.) 587; Christopherson v. Life Ins. Co., 199 Mich. 634, 165 N. W. 793; Randall v. Travelers' Ins. Co., 206 Mich. 418, 173 N. W. 388."

ISSUE V

Rogers' Possession of Policy Which Evidence Showed Was Forwarded to Him by Mistake Did Not Place on Appellant Burden of Proving Why Beneficiary Should Not Recover Judgment.

Instruction No. 3 in effect, charges the jury that a presumption may be considered as evidence. It is admitted that an applicant's possession of a policy acknowledging payment of the first premium raises a presumption that such premium was paid. Though appellee always has the burden of proving all the essential elements of her case, such as delivery of the policy and payment of the premium, this presumption arising from Rogers' possession of the policy placed on appellant the burden of going forward with the evidence. When appellant met the burden by introducing evidence that the policy was mailed by mistake, or was in Rogers' possession as an agent rather than as an individual, and that the premium thereon had not been paid, then the presumption arising from Rogers possession of the policy vanished.

The portion of the instruction reading: "The burden of proof falls on the defendant to establish some reason

regarded by law as good and sufficient why plaintiff should not recover judgment in this action" is a palpably incorrect statement of the law and is hopelessly vague and confusing.

ISSUE VI

Appellant Had Right to Designate Manner in Which Its Counteroffer Should Be Accepted by Rogers. (Appellee's Instruction No. 4)

The portion of the application which pertained to aeronautical activities contained this question (98): "To what extent do you contemplate making use of any aircraft and in what capacity?" In answer to this question Rogers stated: "I *wave* all insurance." In view of the fact that the type of policy Rogers was applying for would pay his beneficiary the face value in the event of Rogers' death while riding in or operating an unlicensed aircraft, a very serious ambiguity was raised by Rogers' statement: "In case of accident I *wave* all insurance." Does it refer to all accidents, accidents in any type of aircraft, or only accidents in an unlicensed aircraft? In any event, appellant was under no obligations to accept Rogers' ambiguous application, and it was certainly at liberty to embody in its counter-offer such terms as it felt were necessary to protect itself against possible disputes arising over interpretation. The existence of Rogers' ambiguous statement does not alter the fact that the appellant did not issue the type of policy he applied for. Rogers' beneficiary under the policy appellant issued was entitled to receive the reserve value in the event of Rogers' death in an unlicensed aircraft and the face value in the event of his death in a licensed passenger aircraft. No one can deny that Rogers, if he so desired, had the right to refuse to accept a policy

which incorporated new provisions. It is elementary that a person in making an offer may indicate the manner in which it must be accepted (12 Amer. Juris. page 537, Sec. 44) and unless an acceptance is made in that manner there is no contract. Plaintiff's requested instruction No. 4, in stating that appellant had no right to do this, was highly prejudicial.

That portion of the instruction which reads: "and if you find all other necessary facts in favor of the plaintiff, you are instructed that plaintiff is entitled to recover," is so vague that it is completely unintelligible, for the jury was not advised as to what "all other necessary facts" were.

CONCLUSION

We submit that the judgment of the District Court is most unjust. It severely penalizes appellant for committing a routine error in the forwarding to one of its agents a policy on such agent's life. Appellant acted promptly in attempting to correct its mistake with the result that the agent was in no way prejudiced thereby. Aside from the fact that the evidence disclosed that the appellant and the applicant never agreed on the terms of the insurance contract, it further disclosed that the applicant who was well aware of appellant's rules attempted to obtain from an unauthorized agent of appellant's an extension of credit for the payment of the first premium. It is the essence of unfairness to hold that such facts give rise to legal liability on the part of appellant.

Respectfully submitted,

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